No. 82-1995

In the Supreme Court of the United States

OCTOBER TERM, 1983

EDWARD NEMBHARD AND JAMES WILSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were unlawfully detained in an airport encounter resting upon probable cause.

2. Whether the trial of petitioner Nembhard should have been severed from that of petitioner Wilson.

3. Whether the indictment should have been dismissed because of the presentation of hearsay evidence, not identified as such, to the grand jury.

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OPINIONS BELOW

The opinion of the court of appeals affirming petitioners' convictions (Pet. App. 1a-5a) is not reported. An earlier opinion of the court of appeals (Pet. App. 6a-25a) is reported at 676 F.2d 193. The district court's opinions suppressing evidence (Pet. App. 26a-33a) and dismissing the indictment (Pet. App. 34a-43a) are reported at 512 F. Supp. 15 and 19, respectively.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 1983. The petition for a writ of certiorari was filed on June 6, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following denial of a motion to suppress evidence and a jury trial in the United States District Court for the Eastern District of Michigan, guilty verdicts were returned against petitioners on counts charging them with possession with intent to distribute of 275 grams of heroin, in violation of 21 U.S.C. 841(a)(1) (Counts 1 and 2), and aiding and abetting each other in the commission of the substantive offenses, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Counts 3 and 4). After the verdicts were returned, however, the district court reconsidered and granted petitioners' motion to suppress the heroin (Pet. App. 26a-33a). The district court also then dismissed the indictment (Pet. App. 34a-43a). The court of appeals reversed both of these rulings and ordered the district court to reinstate the jury's verdict (Pet. App. 6a-25a). On remand, the verdict was reinstated, and each petitioner was sentenced to concurrent terms of five years' imprisonment, to be followed by a special parole term of four years. Petitioners again appealed. The court of appeals affirmed their convictions (Pet. App. 1a-5a).

1. The evidence at the pretrial suppression hearing is summarized in the first opinion of the court of appeals (Pet. App. 8a-10a). On April 21, 1980, DEA Agent William Modesitt and Michigan State Police Detective Sergeant Paul Cleaves watched passengers arrive at the Detroit airport on a flight from New York City. Petitioners were the first two passengers to leave the plane. Nembhard carried a tan vinyl suitcase and Wilson carried a black briefcase. The two men walked separately, in a manner suggesting that they did not know each other. Nembhard nervously scanned the terminal and repeatedly looked behind him as he walked down the concourse. Both men stopped at a bank of telephones and then continued down the concourse. Nembhard walked ahead at first, then was overtaken by Wilson. Nembhard then regained the lead and stopped

at another telephone. He dialed without depositing money. As Wilson again caught up, Nembhard hung up the phone and conversed with him. Together, they entered a restaurant.

By this time, three other agents had joined the surveillance. Petitioners remained in the restaurant for 35 minutes. While there, they exchanged luggage. In the restaurant, and again as petitioners continued down the concourse, Nembhard looked around nervously. He paced as Wilson made yet another telephone call. After the call, petitioners walked together through the terminal, and exited to hail a taxi cab. At this point, Agent Modesitt and two other agents approached Wilson.

Agent Modesitt identified himself and asked Wilson if he would move five or six feet out of the path of pedestrian traffic and answer some questions. Wilson agreed. Modesitt then asked to see Wilson's airline ticket and driver's license. Shaking, Wilson handed the agent a New York driver's license but stated that he had no airline ticket because he had been in Detroit for two days visiting friends. He also denied knowing Nembhard. Wilson agreed to accompany Modesitt to a first aid room inside the terminal for further questioning.

At the same time, DEA Agent Bryda approached Nembhard and asked to see his ticket and some identification. Nembhard denied that he had either and denied knowing Wilson. Nembhard agreed to follow Agent Bryda to the first aid room for further questioning. Inside the room, Nembhard consented to a search of the briefcase, which produced no drugs. The briefcase was, however, filled with Wilson's belongings, rather than his own.

As Nembhard left the room, Wilson entered. Agent Modesitt told Wilson that he was suspected of carrying narcotics. The agent asked if he could search Wilson's suitcase and told Wilson he had a right to refuse. Wilson agreed

to the search, stating that the bag was not his but that he was paid to carry it. One quarter kilogram of heroin was found in the suitcase. Petitioners were immediately arrested.

2. At the conclusion of the suppression hearing, the district court credited the testimony of the five agents and denied the motion to suppress, finding that the initial encounter between petitioners and the agents was supported by a reasonable suspicion (Pet. App. 11a-12a):

> First, the agents saw Defendants debark from the plane from New York City, a known source of white heroin in the midwest. Second, they emerged nervously, "scoping out"; or surveying the persons in the concourse in a more furtive manner than normal travelers. Third, they emerged first from the plane, as is a known habit of couriers, to quickly dissolve into the crowd * * *. Fourth, they had checked no luggage, but had kept carry-on pieces in their possession. Fifth, they clearly attempted to conceal their togetherness, through the concourse. Sixth, they exchanged possession of their respective pieces of luggage, at the airport restaurant. Seven, they went to two separate phones to place calls on at least two occasions, but appeared not to really have conversations. And possibly to use those occasions to further "scope out" the position of the agents who were following them. Eighth, Mr. Nembhard, the obvious leader through their airport peregrinations for almost an hour, continually looked back at the following crowd and made eye contact with the agents on numerous occasions. Nine, after an hour of dawdling, as defendants rounded the last mile of the concourse into the home stretch to the escalator, Nembhard looked back one last time at the agents, and then, after turning the corner, speeded up the pace, moved quickly down the escalator, and out to the cab stand.

The district court also found that Wilson's consent to the search of the tan vinyl suitcase was voluntary. *Ibid.*

3. During petitioners' trial, Sergeant Cleaves explained to the jury what attracted his attention to petitioners (Pet. App. 13a-14a):

> THE WITNESS: They are two gentlemen from New York. They're dressed, apparently alike. They're dressed similarly. They are both of the same race. They both were walking in the same direction. They both went to the telephone. They both appeared to make telephone calls. They both did not converse to each other, but were walking in the same vicinity of each other.
>
> THE COURT: So you were suspicious of them before they had moved from this rampway towards the terminal, really?
>
> THE WITNESS: I was interested in them at that point, your Honor.
>
> THE COURT: As soon as you saw them?
>
> THE WITNESS: Yes.
>
> Q (By [counsel for Nembhard]) So you are interested in black males coming from New York?
>
> A I was interested in these two black males coming from New York.

During the trial, the district court became aware that the indictment was returned on the basis of Agent Modesitt's testimony alone; the other four agents did not testify before the grand jury. Agent Modesitt had informed the grand jury that five agents participated in the surveillance and described their observations collectively, without specifying which events he had observed personally and which were watched only by his colleagues.

a. The district court granted a post-verdict motion to reconsider denial of the suppression motion. The court concluded that the predicate for the officers' suspicion of the defendants was tainted. Sergeant Cleaves had based his suspicion of petitioners on "a completely illogical and unfounded racial stereotype," the court stated, and the observations of the other three agents were tainted by the initial judgment of Sergeant Cleaves (Pet. App. 30a-31a). The court also found that the credibility of Agent Modesitt's denial at the suppression hearing that his suspicions had been racially motivated had been undermined by his failure to disclose to the grand jury that some of his testimony was hearsay. The heroin was suppressed on the ground that the defendants' consent to search of their luggage was fruit of an unlawful detention (Pet. App. 32a-33a).

b. After suppressing the heroin, the district court dismissed the indictment on the ground that Agent Modesitt had misled the grand jury into believing that he had personally observed petitioners during their entire stay in the Detroit airport. The court found Agent Modesitt's testimony "an abuse of the grand jury system so egregious as to warrant intervention by the use of the court's supervisory powers." Pet. App. 42a.

4. The court of appeals reversed both the suppression and dismissal rulings and directed that the guilty verdicts be reinstated. Dismissal of the indictment was an abuse of discretion, the court of appeals held (Pet. App. 16a-17a), noting that "[t]here is no showing in this record that prosecutorial misconduct is a long-standing or common problem in grand jury proceedings in this district." *Id.* at 16a. The court remarked that neither petitioner had been prejudiced by the use of hearsay evidence, because Agent Modesitt's "summary of the surveillance activities accurately reflected the events as they unfolded." *Id.* at 17a. The "extreme

sanction of dismissing the indictment was clearly unwarranted," the court held, in light of the absence of any prejudice or any constitutional violation and "the strong public interest in prosecuting crimes." *Id.* at 16a-17a; footnote omitted.

The court of appeals also held that the district court abused its discretion in departing from its initial findings on the motion to suppress. The court of appeals concluded that Sergeant Cleaves's trial testimony did not support the district court's view that the officer's suspicion was racially based, explaining (Pet. App. 18a):

> When considered in context, Cleaves's observation that [petitioners], the first two individuals off the flight, were of the same race was just one of several factors indicating to Cleaves that the defendants were travelling together, and he became suspicious because they were trying to appear as if they were not together.

Finding no reason for discrediting Cleaves's initial or subsequent observations, the court of appeals concluded that "the suspicions of his colleagues of course were not tainted." *Ibid.* Moreover, the independent observations of the remaining agents corroborated the observations of Cleaves and Modesitt. *Id.* at 19a. Considering all of their observations together, the court of appeals found that the objective facts supported a reasonable inference that petitioners "were engaged in criminal activity, thus warranting a brief investigatory stop for questioning." *Id.* at 21a-22a. Moreover, petitioners' responses to the initial questions posed by the agents gave rise to probable cause, permitting continued detention. *Id.* at 24a-25a. Accordingly, Wilson's consent to the search of his suitcase was held untainted by an unlawful detention. Because the record was found to be barren of any facts that would undercut the district court's initial finding that the consent was voluntary, *id.* at 25a, the court of appeals found no Fourth Amendment violation.

5. On remand, the district court reinstated the verdicts and sentenced petitioners. Petitioners appealed their convictions, asserting that various errors had occurred at trial. The court of appeals affirmed, finding no trial errors (Pet. App. la-5a). Specifically, the court of appeals rejected petitioner Nembhard's claim that he should have been granted a severance to enable Wilson to testify that he had carried the tan suitcase at all times. Both courts below concluded that this testimony would not have exculpated Nembhard, and that the denial of his severance motion accordingly was not an abuse of discretion. *Id.* at 2a-4a.

ARGUMENT

1. Petitioners do not challenge the legality of their initial encounter with the DEA agents. Instead, they contend (Pet. 10-13) that they were illegally detained when they were asked to accompany the agents inside the terminal to the first aid room. Relying on *Florida* v. *Royer,* No. 80-2146 (Mar. 23, 1983), they argue that the investigatory detention evolved into an arrest at this point. But whatever the merits of petitioners' contention that they were arrested for Fourth Amendment purposes when they moved to the first aid room,[1] their detention was lawful because it was supported by probable cause, as the court of appeals held (Pet.

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[1]We note that at least two significant factors pointing to a finding of an arrest in *Royer* were absent here. Unlike the agents in *Royer,* the agents here were not holding petitioners' luggage or airline tickets when they asked petitioners to accompany them to the first aid room. Moreover, unlike Royer, petitioners were not about to board a plane; their trip had ended. Thus, whereas Royer had no choice but to follow the agents since they had deprived him of his means of travel, petitioners were not so restrained. See *Florida* v. *Royer, supra,* slip op. 11 (opinion of White, J.). In any event, this case does not turn on the question whether or at what point petitioners were arrested, for, as explained in the text, an arrest would have been lawful here at the point at which the investigation adjourned to the first aid room.

App. 24a-25a). Accordingly, there is no need to remand this case to the court of appeals, as petitioners suggest (Pet. 13), for reconsideration in light of *Royer*.

The officers plainly had probable cause to believe that petitioners were committing a crime. The officers' observations initially gave them reasonable grounds to suspect petitioners and to stop them briefly for questioning. Petitioners had arrived from a source city for heroin. They were the first two passengers to exit the plane, exhibiting behavior typical of drug couriers. Nembhard nervously scanned the concourse, apparently looking for surveillance. Although several factors indicated that petitioners were traveling together, they pretended to be strangers as they walked through the terminals. Finally, at the restaurant, petitioners acknowledged each other's presence, and exchanged luggage. Petitioners' responses to the questions put to them established probable cause for their arrest. Although they ate together, exchanged luggage and departed the terminal together, each denied knowing the other when confronted by the DEA agents. Petitioners also attempted to conceal the fact that they had just arrived from New York. Wilson claimed that he had been in Detroit for two days and Nembhard denied having any identification or a ticket.

Petitioners concede (Pet. 12; footnote omitted) that "further questioning was warranted once the agents received false answers." They complain (Pet. 11), however, that the court of appeals never explicitly stated that the agents had probable cause to arrest at this point, but stated only (Pet. App. 24a-25a) that the agents had "probable cause for continued detention for additional questioning." This contention is a non sequitur. The lawfulness of the petitioners' detention is relevant only insofar as an unlawful detention might taint Wilson's consent to the search of the tan suitcase. It is irrelevant for this purpose whether petitioners were properly arrested — as opposed to being

properly detained for extended questioning — for there is no suggestion that the detention had any distinctive attributes of a custodial arrest that rendered the consent ineffective. In any event, the court of appeals plainly found probable cause to arrest. Probable cause is a single standard that allows an agent to detain a suspect either for questioning as in *Dunaway* v. *New York*, 442 U.S. 200 (1979), or for the purpose of charging the suspect with a crime. There is no need to remand this case to determine whether the court of appeals meant probable cause to arrest or to detain for extended questioning, for the court specified that the seizure was valid "[e]ven if the questioning of the defendants is considered a custodial interrogation amounting to the essential equivalent of an arrest" (Pet. App. 24a).

2. Petitioner Nembhard contends (Pet. 13-21) that he should have been granted a severance so that petitioner Wilson could have testified on his behalf. Nembhard claims that Wilson would have reiterated his suppression hearing testimony, in which he stated that he carried the tan suitcase containing the heroin from the moment he got off the plane until he was arrested. But, as both courts below found, Wilson's testimony at the suppression hearing did not exculpate Nembhard and was not credible. Indeed, other pieces of Wilson's suppression hearing testimony provided ample material for impeachment. Although Wilson testified that he, rather than Nembhard, carried the tan suitcase off the plane, he acknowledged that he and Nembhard were traveling together. Wilson further admitted telling the agents that the suitcase was not his, but that he was carrying it for someone else. At the suppression hearing, Wilson was unable to say whose clothing the tan suitcase contained, but he acknowledged that he owned the black briefcase that Nembhard was carrying at the time of their arrest. In short, Wilson's testimony could not have disassociated Nembhard

from Wilson or the tan suitcase. On the contrary, Wilson's testimony tended to show that he and Nembhard had joint custody of their luggage.

Motions for severance are committed to the sound discretion of the district court. *United States* v. *Kopituk*, 690 F.2d 1289, 1316 (11th Cir. 1982), cert. denied, No. 82-1530 (May 16, 1983); *United States* v. *Thomas*, 676 F.2d 239, 243 (7th Cir. 1980), cert. denied, 450 U.S. 931 (1981). Because Wilson's testimony was not exculpatory, and any favorable portion could readily have been impeached, there was no abuse of that discretion here. See *United States* v. *Melton*, 689 F.2d 679, 686 (7th Cir. 1982); *United States* v. *Duzac*, 622 F.2d 911, 912 (5th Cir.), cert. denied, 449 U.S. 1012 (1980).

3. The court of appeals correctly concluded that Agent Modesitt's grand jury testimony provided no basis for dismissing the indictment. It is well established that an indictment is not subject to attack merely because it was returned in whole or in part on the basis of hearsay evidence. *Costello* v. *United States*, 350 U.S. 359 (1956). The grand jury is unencumbered by the technical rules of evidence. *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). And although it may be the better practice for a witness to advise the grand jury that his testimony is hearsay, the Constitution does not require that he do so.[2] Dismissal of an indictment is particularly inappropriate where, as here, the defendant has not been prejudiced by the use of hearsay evidence. Cf. *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 6-8. As the court of appeals observed (Pet. App. 17a), Agent Modesitt accurately summarized the observations of his colleagues. Moreover, Agent Modesitt was present during

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[2]The court of appeals noted (Pet. App. 17a n.4) that Agent Modesitt did not affirmatively misrepresent the nature of his testimony.

most of the surveillance and was absent only for a portion of petitioners' walk through the concourse to the restaurant. The bulk of his testimony accordingly was based on personal knowledge. He personally observed petitioners as they got off the plane and began their journey through the terminal; he resumed surveillance at the restaurant and stayed with petitioners until their arrests. In these circumstances, the failure of Agent Modesitt to inform the grand jury that he was relying on the observations of his colleagues for a small portion of his testimony did not prejudice petitioners.

Petitioners contend that the decision of the court of appeals conflicts with the decision of the Second Circuit in *United States* v. *Estepa*, 471 F.2d 1132 (1972), and urge that the conflict be resolved. In *Estepa*, the Second Circuit invoked supervisory power, dismissing an indictment in order to enforce prior admonitions against continuation of what was said to be a long-standing prosecutorial practice in the particular district of not advising grand juries that they were receiving hearsay evidence. See also *United States* v. *Hogan*, Nos. 82-1243 and 82-1287 (2d Cir. June 28, 1983). As the court of appeals here emphasized (Pet. App. 16a), the record of the instant case does not reveal a history of prosecutorial misconduct [redacted] in the Eastern District of Michigan. Nor, as petitioners appear to acknowledge (Pet. 22), is there any background in the Sixth Circuit of unheeded admonitions against presentation of testimony such as that given by Agent Modesitt. Accordingly, there is no reason to believe that the Second Circuit would have required dismissal here — a sanction that court has labeled the " 'most drastic remedy,' " appropriate "[o]nly in very narrow circumstances" (*United States* v. *Artuso*, 618 F.2d 192, 197 (2d Cir. 1980), quoting *United States* v. *Fields*, 592

F.2d 638, 647 (2d Cir. 1978), cert. denied, 442 U.S. 917 (1979)).[3] Moreover, in light of *United States* v. *Hasting, supra, Estepa* could not properly be applied where, as here, petitioners were not prejudiced by the presentation of hearsay.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] *Estepa* has not been followed in other circuits. In addition to the court of appeals' decision here, see, *e.g., United States* v. *Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir. 1983), cert. denied, No. 82-6149 (May 16, 1983).